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6 IN THE UNITED STATES DISTRICT COURT FOR THE  
7 EASTERN DISTRICT OF CALIFORNIA

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9 UNITED STATES OF AMERICA,

10 Plaintiff,

CR. NO. S-02-0246 EJG  
CIV. NO. S-06-2728 EJG

11 v.  
12 OCTAVIO HERNANDEZ SUAREZ,

Defendant.

13 \_\_\_\_\_ / ORDER DENYING MOTION TO  
VACATE, SET ASIDE OR CORRECT  
SENTENCE

14 Defendant, a federal prisoner proceeding pro se, has filed a  
15 motion to vacate, set aside or correct his sentence pursuant to  
16 28 U.S.C. § 2255. After reviewing the record, the documents  
17 filed in connection with the motion, and the applicable law, the  
18 court has determined the motion may be decided without an  
19 evidentiary hearing because the files and records of the case  
20 affirmatively show the factual and legal invalidity of  
21 defendant's arguments. Shah v. United States, 878 F.2d 1156,  
22 1158-59 (9<sup>th</sup> Cir. 1989). For the reasons that follow, the motion  
23 is DENIED.

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1                           BACKGROUND

2                           Defendant was convicted May 12, 2004, following a jury  
3 trial, of one count of conspiracy to distribute more than 50  
4 grams of methamphetamine, and one count of possession with intent  
5 to distribute more than 50 grams of methamphetamine, in violation  
6 of 21 U.S.C. §§ 841(a)(1) and 846.<sup>1</sup> At sentencing he affirmed  
7 that he had been convicted of a prior drug felony. He was  
8 sentenced July 30, 2004 to a term of 240 months imprisonment and  
9 120 months supervised release. His convictions and sentence were  
10 affirmed by the Ninth Circuit Court of Appeals in a memorandum  
11 decision filed June 16, 2006. United States v. Suarez, 185 Fed.  
12 Appx. 597 (9<sup>th</sup> Cir. 2006).

13                           DISCUSSION

14                           Defendant raises three arguments in support of his motion.  
15 First, he argues his trial attorney was ineffective for failing  
16 to advise him of a plea offer. Second, in a related argument,  
17 defendant contends his counsel was ineffective for failing to  
18 advise him of his right to plead guilty without an agreement.  
19 Third, defendant argues his prior state conviction should have  
20 been classified as a misdemeanor under federal law, thereby  
21 negating the enhancement he received for a prior felony drug  
22 conviction.

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<sup>1</sup> This was the second jury trial. A mis-trial was declared after the first jury was unable to  
25 reach a unanimous verdict, voting 10-2 for guilt.

#### A. Failure to inform defendant of plea offer

Defendant contends his trial attorney "may" not have informed him of a plea offer received from the government in September of 2003, thus violating his sixth amendment right to effective assistance of counsel. Had this offer been communicated, argues defendant, he would have accepted it, elected not to proceed to trial, and have received a much shorter term of incarceration.

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and fell below an "objective standard of reasonableness", and that but for the deficiencies, "there is a reasonable probability" the outcome would have been different.

See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). Defense counsel is presumed to have acted reasonably and to have provided constitutionally adequate assistance. Id. at 690. Moreover, second guessing of counsel's tactical decisions after conviction cannot form a basis for a claim of ineffective assistance.

An attorney's failure to communicate a plea offer can be unreasonable conduct under prevailing professional standards. See United States v. Blaylock, 20 F.3d 1458, 1466 (9<sup>th</sup> Cir. 1994). In support of his claim, defendant attaches a letter dated September 16, 2003 from the government to his trial attorney setting forth the terms of an offer to plead to Count One, in

1 exchange for a dismissal of the § 851 information charging a  
2 prior drug felony conviction. Defendant contends he did not know  
3 of the plea offer until provided with the records of his case by  
4 his appellate attorney.

5 Evidence submitted by the government belies this contention.  
6 Declarations of defendant's trial counsel and of the interpreter  
7 establish that plea offers were communicated to defendant by his  
8 attorney through a court-certified interpreter. Bolstering the  
9 declarations are copies of counsel's time records confirming  
10 meetings with defendant to discuss "offer", "plea agreement",  
11 "counter-offer" and "final offer". Both trial counsel and the  
12 court interpreter explain that defendant was adamant on each  
13 occasion that he was unwilling to except the government's offer.  
14 Finally, defendant himself is not sure of the communication, or  
15 lack thereof, of a plea offer. In his memorandum of law in  
16 support of his motion, defendant states that his attorney "may  
17 not have relayed [the] offer. . . ." Memorandum of Law in  
18 Support of Habeas Corpus Motion, p.4 (emphasis added). Based on  
19 the foregoing, this evidence overwhelmingly and "conclusively  
20 show[s]" that defendant is not entitled to relief. See Blaylock,  
21 20 F.3d at 1465, quoting 28 U.S.C. § 2255. Accordingly, this  
22 claim for relief is DENIED.

23       B. Failure to inform defendant of all options

24       Defendant also contends that his trial attorney was  
25 ineffective by failing to inform him of the possibility of

1 pleading guilty without an agreement. Specifically, defendant  
2 contends that after his first trial ended in a mistrial, his  
3 attorney should have told him he could plead guilty and receive a  
4 three-level sentence reduction for acceptance of responsibility.  
5 In support defendant offers his declaration that he was not  
6 informed of all possible options to resolve his case.

7 Once again, defendant's assertions are simply not credible.  
8 The declarations of trial counsel and the court-certified  
9 interpreter stand in vivid contradiction to defendant's  
10 unsupported conclusory statement. Defendant, having lost on  
11 direct appeal, is looking for any way he can to ameliorate the  
12 effects of a lengthy term of incarceration. However, he cannot  
13 do it by picking apart the performance of his attorney without  
14 evidence. As the Supreme Court noted, counsel's performance must  
15 be evaluated without the "distorting effects of hindsight". See  
16 Strickland, 466 U.S. at 689. This claim for relief is DENIED.

C. Prior drug conviction

18 Defendant maintains that his sentence was erroneously  
19 enhanced for a prior state drug conviction which was improperly  
20 classified as a felony, instead of as a misdemeanor. Defendant,  
21 citing the recent Supreme Court Lopez case argues that his  
22 sentence of 180 days for a violation of California Health and  
23 Safety Code § 11351 converts the offense, possession of heroin  
24 for sale, into a misdemeanor. The argument, and defendant's  
25 reliance on Lopez in support of the argument, are misplaced. In

1    Lopez, the Supreme Court made clear that a federal sentence can  
2    be enhanced for a prior state drug conviction only if the offense  
3    is punishable as a felony under the federal Controlled Substances  
4    Act.   See United States v. Lopez, 127 S.Ct. 625 (2006).  
5    Possession of a controlled substance for sale is such an offense.  
6    See 21 U.S.C. § 841(a).   Defendant's citation to and reliance on  
7    United States v. Figueroa-Ocampo in his traverse is inapposite.  
8    In that case the prior state drug conviction was for simple  
9    possession, an offense that could be construed as a misdemeanor  
10   under the federal Controlled Substances Act.   United States v.  
11   Figueroa-Ocampo, 494 F.3d 1211 (9<sup>th</sup> Cir. 2007).   See also, 21  
12   U.S.C. § 844(a).   The *length* of the sentence imposed by the state  
13   court is irrelevant to the classification of the offense as a  
14   felony or misdemeanor under federal law.   Here, the prior  
15   conviction is for **possession for sale**, a felony under federal  
16   law.   Accordingly, defendant's sentence was properly enhanced and  
17   this claim for relief is DENIED.

18                          CONCLUSION

19         Based on the foregoing, defendant's motion to vacate, set  
20   aside or correct his sentence is DENIED.   The Clerk of Court is  
21   directed to close companion case, CIV. NO. S-06-2728 EJG.

22         IT IS SO ORDERED.

23         Dated: March 20, 2008

24                          /s/ Edward J. Garcia  
25                          EDWARD J. GARCIA, JUDGE  
26                          UNITED STATES DISTRICT COURT

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